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Application granted. The parties can object to the opposing party's presentation in real-time at the argument.

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R. TERRY PARKER
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January 24, 2011

SO ORDERED:

WILLIAM H. PAULEY III U.S.D.J.
1/25/11

BY HAND

RECEIVED
JAN 24 2011
CHAMBERS OF
WILLIAM H. PAULEY
U.S.D.J.

The Hon. William H. Pauley III
Daniel Patrick Moynihan
United States District Courthouse
Southern District of New York
500 Pearl Street
Room 2210
Courtroom 11D
New York, NY 10007

Re: Capitol Records, LLC, et al. v. MP3tunes, Inc., et ano
No. 07 Civ. 9931 (WHP)

Dear Judge Pauley:

We represent the defendants in the above referenced matter. In anticipation of the hearing in this matter scheduled for January 28, 2011 at 11:30 a.m., the defendants submit this joint letter to make the following requests for access to audio-visual equipment.

Defendants' Position

For this Friday's hearing, we respectfully request access to a projector, screen and audio equipment, as well as an opportunity to test this equipment prior to the commencement of the hearing. We further request that the court execute the attached standing order granting permission to R. Terry Parker and Savitry Sarwan[1] to bring a laptop computer to the courtroom. We also request to have access to the Internet via a wireless code or some other sort of access device. In addition, we request the opportunity to test the adequacy of the wireless signal prior to the commencement of the hearing, as such signals can vary in strength from place to place, especially in large buildings such as the courthouse.

[1] We note that Ms. Sarwan is not an attorney but an IT specialist with Duane Morris LLP.

On December 23, 2010, Defendants' counsel asked Plaintiffs whether it would consent to making a joint request for leave to bring audio-visual equipment to oral argument. Despite the fact that Plaintiffs' counsel also intended to use such equipment and rather than merely agreeing to this simple request, Plaintiffs' counsel is once again attempting to turn this minor administrative issue into yet another pointless dispute.

Plaintiffs' attempt to fabricate a dispute regarding this issue is entirely groundless and unnecessary. A request to use audiovisual equipment is a routine request. Although Plaintiffs claim that they believe that Defendants intend to use this equipment to introduce extraneous material into the record, Plaintiffs' accusation is based entirely on speculation.

Plaintiffs are using this request as an improper vehicle to seek the disclosure of Defendants' materials and to make those materials subject to Plaintiffs' counsel's approval. Naturally, Defendants refuse to seek Plaintiffs' approval, or even to discuss such a topic with Defendants. Plaintiffs have no real basis for their allegations given that both parties will have an opportunity to object. The Court has the discretion to exclude any material that is improper.

Plaintiffs' blatant attempt to manipulate this routine request into another needless dispute wastes the Court's valuable time and resources.

Plaintiffs' Position

Plaintiffs have no objection to Defendants' use of audio-visual equipment to present record evidence in the course of oral argument; in fact, Plaintiffs also seek leave to bring a laptop computer to the courtroom and to have the Court's Audio & Video department provide a projector and screen. Plaintiffs respectfully request that the Court execute the attached Order, the form required by the Court's standing order issued February 8, 2010 with respect to Electronic Devices and General Purposes Computing Devices, permitting Jacob B. Radcliff to bring a laptop through the Court's security for this purpose.

Plaintiffs believe, however, that Defendants' counsel seeks to use audio-visual equipment to introduce material extraneous to the record on summary judgment. On December 23, 2010, Defendants' counsel asked us whether Plaintiffs would consent to making a joint request for leave to bring audio-visual equipment to oral argument. Plaintiffs responded that they would join such a request but would not consent to "the use of oral argument for the purpose of displaying material that is not a part of the evidentiary record." *See* Exhibit A. Plaintiffs stated that if it was Defendants' intent, at oral argument, to display material that was not before the Court, they should send us their half of a proposed joint letter so the Court could resolve this dispute.

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Plaintiffs received no response to their email for more than three weeks. Then, with no further explanation, Defendants sent their half of this letter. When we transmitted the draft of our portion of the letter, Defendants substantially revised their portion, among other things, accusing us of manufacturing a dispute and wasting the Court's time. Accordingly, Plaintiffs once again contacted MP3tunes' counsel to try to resolve the issue. Specifically, Plaintiffs said that they were not looking for MP3tunes to identify the evidence it intended to use at oral argument, but only for a statement as to whether such evidence was already in the record. *See* Exhibit B. MP3tunes refused to provide that information.

Accordingly, Plaintiffs must raise the issue now. We do not believe that it is appropriate to use oral argument to present evidence that is not already before the Court on summary judgment. The parties have had ample opportunity in six separate filings to present a full evidentiary record to the Court, and the time for the submission of evidence on the motions has passed. Moreover, any attempt to use oral argument to place additional "evidence" Plaintiffs have had no opportunity to review with respect to the argument would amount to an unauthorized sur-reply and would be greatly prejudicial. Lastly, the purpose of oral argument is to argue the merits of the material submitted to the Court and to address the Court's questions, *not* to introduce new evidentiary material.

While Plaintiffs do not object, and in fact join, Defendants' request to bring audio-visual equipment to oral argument, Plaintiffs request that any order allowing audio-visual equipment make it clear that neither party will be permitted to use such equipment for the purpose of displaying material that is not already part of the record in this action.

Respectfully submitted,

R. Terry Parker

Andrew H. Bart

cc: All Counsel of Record (by e-mail)

Attachment A

McFadden, Joseph J.

From: McFadden, Joseph J.
Sent: Monday, December 27, 2010 1:20 PM
To: 'Parker, Terry'
Cc: Dellaportas, John; Gulia, Gregory P.; Bart, Andrew H.; Fabrizio, Steven B; Frank Scibilia; 'Radcliff, Jacob B.'
Subject: Audiovisual equipment

Terry,

In response to your request on Thursday, we are willing to consent to the use of audiovisual equipment for the purpose of displaying evidence submitted as exhibits to the summary judgment papers. However, we will not consent to (nor do we think Judge Pauley will allow) the use of oral argument for the purpose of displaying material that is not a part of the evidentiary record.

If you agree to limit the use of the audiovisual equipment to evidence already part of the summary judgment record, then we can submit a joint request to the Court. Otherwise, we will need to see your half of the joint letter and be given an opportunity to draft our half.

Regards,
Joe

Attachment B

McFadden, Joseph J.

From: McFadden, Joseph J.
Sent: Monday, January 24, 2011 12:29 PM
To: 'Parker, Terry'
Cc: Bart, Andrew H.; 'Radcliff, Jacob B.'; 'Scibilia, Frank P.'; Gulia, Gregory P.; Hew, Vanessa C.
Subject: RE: Capitol Records, LLC, et al. v. MP3tunes, Inc., et ano

Terry,

Your most recent draft materially changes to content of your letter. Before we modify our portion in response, we might be able to avoid the need of burdening the Court if you will simply tell us whether you intend to display material outside of the record. If you do, we should raise the issue now and avoid taking the time out of oral argument. If you don't intend to introduce new material, then we don't have any need for this letter.

To be clear: We are not asking you the details of the materials you intend to use at oral argument, only whether those materials are already part of the evidentiary record on summary judgment. The mere fact that you won't confirm that point (and instead would force us to go through the exercise of drafting dueling letters) forces us to assume that we have correctly interpreted your intentions.

We will wait for your response.

Joe

-----Original Message-----
From: Parker, Terry [mailto:TParker@duanemorris.com]
Sent: Monday, January 24, 2011 11:56 AM
To: Parker, Terry; McFadden, Joseph J.
Cc: Bart, Andrew H.; 'Radcliff, Jacob B.'; 'Scibilia, Frank P.'; Gulia, Gregory P.; Hew, Vanessa C.
Subject: RE: Capitol Records, LLC, et al. v. MP3tunes, Inc., et ano

Joe,

We will deliver the letter by hand, not by fax.

Terry

-----Original Message-----
From: Parker, Terry
Sent: Monday, January 24, 2011 11:46 AM
To: McFadden, Joseph J.
Cc: 'Bart, Andrew H.'; 'Radcliff, Jacob B.'; Scibilia, Frank P.; Gulia, Gregory P.; Hew, Vanessa C.
Subject: Capitol Records, LLC, et al. v. MP3tunes, Inc., et ano

Joe,

Attached is the joint letter regarding audio visual equipment. Please include the attachments you've referenced and execute and we will fax the letter and attachments to the Court.

Regards,